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Working to Protect Native Species and Their Habitats

P.O. Box 1512, Laramie, WY 82073 (307) 742-7978 fax: 742-7989
Denver Office: 1536 Wynkoop, Suite B501 Denver, CO 80202 (303) 454-3370

**BY CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

January 26, 2006

Gale Norton
Secretary of the Interior
1849 C Street, NW
Washington, DC 20240

Dale Hall
U.S. Fish and Wildlife Service Director
1849 C Street, NW
Washington, DC 20240

Pete Gober
South Dakota Field Office Supervisor
U.S. Fish and Wildlife Service
420 S. Garfield, Suite 200
Pierre, SD 57501

**RE: NOTICE OF INTENT TO FILE SUIT OVER VIOLATIONS OF SECTION 4 OF THE
ENDANGERED SPECIES ACT WITH REGARDS TO A 2006 NEGATIVE 90-DAY FINDING
OVER THE PETITION TO LIST THE BLACK HILLS POPULATION OF AMERICAN DIPPER**

Dear Secretary Norton, Director Hall, and Supervisor Gober:

Pursuant to the citizen suit provision of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g)(2), Biodiversity Conservation Alliance, Center for Native Ecosystems, Jeremy Nichols, and other interested parties hereby give notice that they intend to file suit against all of you after 60 days for your violation of the ESA with regards to the January 26, 2006 90-day finding that the March 2003 petition to list the Black Hills of South Dakota population of American dipper (*Cinclus mexicanus*) as threatened or endangered under the ESA did not present substantial scientific information indicating listing may be warranted (71 Fed. Reg. 4342-4344, hereafter "negative 90-day finding"). The negative 90-day finding, which was authored by staff of the South Dakota Field Office of the U.S. Fish and Wildlife Service ("USFWS") under supervision of Pete Gober, Field Supervisor, and signed by Thomas O. Melius, Acting Director of the USFWS, was issued under the authority of Secretary of the Interior Gale Norton (hereafter "Secretary").

Background

1. 90-day Findings

Regulations implementing the ESA require the Secretary of the Interior through the USFWS, to the maximum extent practical, within 90-days of receiving a petition to list a species as threatened or endangered under the ESA make a finding as to whether the petition presents substantial scientific information indicating that listing may be warranted. 50 CFR § 424.14(b)(1). This is often called a “90-day finding.” If the Secretary makes a positive 90-day finding, or determines that a petition presents substantial scientific information indicating the petitioned action may be warranted, the Secretary is required to commence a rigorous review of the species’ status and make a determination as to whether listing is warranted. This determination is called a 12-month finding. If the Secretary makes a negative 90-day finding, the petition is rejected and no further review is conducted.

At the 90-day finding stage, the Secretary is required to determine only whether a petition presents substantial scientific information indicating the petitioned action may be warranted. Regulations implementing the ESA define “substantial information” as “that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted.” 16 USC § 1534(b)(3)(A) and 50 CFR § 424.14(b)(1). The Secretary does not critically analyze petitions, conduct additional research, or make a determination as to whether listing under the ESA is warranted at the 90-day finding stage. As the Secretary explained in the negative 90-day finding regarding the petition to list the Black Hills population of American dipper:

We [the USFWS] do not conduct additional research to make a 90-day finding, nor do we subject the petition to rigorous critical review. Rather, as the Act and regulations contemplate, in coming to a 90-day finding, we acknowledge the petitioner’s sources and characterizations of the information unless we have specific information to the contrary.

Our 90-day findings consider whether the petition states a reasonable case for listing on its face. Thus, our finding expresses no view as to the ultimate issue of whether the species should be listed. We reach a conclusion on that issue only after a more thorough review of the species’ status.

71 Fed. Reg. 4341-4342.

2. Distinct Population Segments

The ESA requires that any species, subspecies, or distinct vertebrate population segment meeting any one or more of the criteria set forth at 16 USC § 1534(a)(1)(A)-(E) must be listed as threatened or endangered. While the ESA does not define what constitutes a vertebrate distinct population segment (“DPS”), a 1996 policy (hereafter “DPS policy”) explains the criteria that are to be addressed in determining the existence of a DPS and the appropriateness of listing under the ESA:

Three elements are considered in a decision regarding the status of a possible DPS as endangered or threatened under the Act. These are applied similarly for addition to the lists of endangered and threatened wildlife and plants, reclassification, and removal from the lists:

1. Discreteness of the population segment in relation to the remainder of the species to which it belongs;
2. The significance of the population segment to the species to which it belongs; and
3. The population segment's conservation status in relation to the Act's standards for listing (i.e., is the population segment, when treated as if it were a species, endangered or threatened?).

61 Fed. Reg. 4721-4725. The DPS policy explains the meaning of discreteness and significance, stating:

Discreteness: A population segment of a vertebrate species may be considered discrete if it satisfies either one of the following conditions:

1. It is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors. Quantitative measures of genetic or morphological discontinuity may provide evidence of this separation.
2. It is delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the Act.

Significance: If a population segment is considered discrete under one or more of the above conditions, its biological and ecological significance will then be considered in light of Congressional guidance (see Senate Report 151, 96th Congress, 1st Session) that the authority to list DPS's be used "sparingly" while encouraging the conservation of genetic diversity. In carrying out this examination, the Services will consider available scientific evidence of the discrete population segment's importance to the taxon to which it belongs. This consideration may include, but is not limited to, the following:

1. Persistence of the discrete population segment in an ecological setting unusual or unique for the taxon,
2. Evidence that loss of the discrete population segment would result in a significant gap in the range of a taxon,

3. Evidence that the discrete population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historic range, or
4. Evidence that the discrete population segment differs markedly from other populations of the species in its genetic characteristics.

Because precise circumstances are likely to vary considerably from case to case, it is not possible to describe prospectively all the classes of information that might bear on the biological and ecological importance of a discrete population segment.

Id. If a population is determined to be discrete and significant under the DPS policy, its status is assessed in accordance with 16 USC § 1534(a)(1)(A)-(E) to determine whether listing is warranted.

3. The American dipper in the Black Hills of South Dakota

The American dipper has been described as the only true aquatic songbird and is most noted for its odd dipping behavior, as well as its unique ability to live, feed, and play in the rapids and cascades of cool mountain streams throughout western North America. Besides its unique behavior, the dipper is also an important indicator of water quality. Healthy populations of American dipper indicate healthy stream ecosystems, a relationship that is an invaluable tool in assessing the overall health of our environment.

The Black Hills are described as an “island in a sea of plains.” The mountain range, located in western South Dakota and northeastern Wyoming, is nearly two million acres in size and is entirely separated and isolated from other mountain ranges to the west by over 150 miles of grasslands. While its geographic isolation is unique, the biological values of the Black Hills are what truly set the ecosystem apart from others. An ecological “mixing zone,” the Black Hills ecosystem is comprised of species from western, eastern, northern, and central North American environments. As such, the Black Hills supports many disjunct and peripheral populations of fish, wildlife, and plant populations. And, as an isolated mountain ecosystem, the Black Hills have come to support a host of endemic species found nowhere else on Earth.

Unfortunately, as an isolated mountain ecosystem, the Black Hills are incredibly fragile and extremely sensitive to environmental change. As documented today, over a century of extensive logging, road construction, mining, domestic livestock grazing, private land developments, water developments, and other activities have left the ecosystem on the verge of collapse. Old growth forest is virtually nonexistent, perennial streams suffer from water quality problems, native plants are being replaced by nonnatives, natural disturbance processes are being controlled and/or eliminated, streams have been extensively dammed and diverted, native fish are literally being eaten away by nonnative fish, and developments are replacing large amounts of forest and riparian habitat. These impacts have taken their toll on native species. However, little has been done to curb the ecological destruction.

The American dipper exists as an isolated, peripheral, and genetically distinct population in the Black Hills. The bird is at the eastern edge of its global distribution in the Black Hills, is isolated, and has evolved independently of other populations to the west. The population historically inhabited nearly all permanent, fast-flowing streams in the area.

Populations of American dipper have unfortunately declined sharply on the Black Hills. This decline has been attributed to poor water quality, habitat degradation, reduced or erratic flows in streams, and lack of suitable nesting habitat. Much of the bird's formerly occupied habitat is now considered sink habitat (habitat that is unable to support the long-term survival of populations) thus presenting serious limitations upon the success of local dispersal and reestablishment. Overall, breeding dippers have disappeared from nearly 86% of their historical range in the Black Hills. The bird has been listed as Threatened by the State of South Dakota since 1996.

4. The Petition to List the Black Hills Population of American Dipper

On March 28, 2003, Biodiversity Conservation Alliance, Center for Native Ecosystems, Jeremy Nichols, and others submitted a petition to list the American dipper in the Black Hills of South Dakota as a threatened or endangered DPS pursuant to the ESA and the Administrative Procedures Act ("APA"). The petition, which was over 100 pages long, drew upon over 250 sources of scientific information. Among other things, the petition called upon the Secretary and the USFWS to list the Black Hills population of American dipper as threatened or endangered under the ESA because of significant population declines, habitat loss and degradation, ongoing threats to habitat, and inadequate regulatory mechanisms.

The petition called upon the Secretary, through the USFWS, to list the Black Hills population of American dipper in accordance with the DPS policy. In support of recognizing the discreteness of the American dipper population in the Black Hills of South Dakota, the petition presented detailed information regarding the physical isolation of the population. In support of recognizing the population as significant under the DPS policy, the petition presented detailed information, including information from the USFWS, documenting the persistence of the species in an ecosystem that is unique to the species and documenting that the loss of the population would represent a significant gap in the range of the taxon. The petition also presented detailed information, including information from the USFWS, supporting the high likelihood that the Black Hills population of American dipper was genetically distinct based on its isolation in the Black Hills and the peripheral nature of the population.

5. The Negative 90-day Finding

In the negative 90-day finding regarding the petition to list the Black Hills population of American dipper as a threatened or endangered DPS, the Secretary, through the USFWS, concluded that the petition included "supporting information regarding the species' taxonomy and ecology, historical and current distribution, present status, and potential causes for decline," and that the Black Hills population of American dipper has declined significantly. 71 Fed. Reg.

4342. The negative 90-day finding further concluded that, under the DPS policy, the population “may be” discrete, stating:

Substantial information is presented in the petition to indicate that the Black Hills population may be markedly separated from other populations of the American dipper as a consequence of physical factors [and that] [i]nformation in the petition, as supported by information readily available in our files, suggests that there is a substantial physical isolation of the Black Hills population of the American dipper. Therefore, the petition presents substantial scientific information indicating that the Black Hills population of the American dipper meets a condition for discreteness under our DPS policy.

71 Fed. Reg. 4343.

Unfortunately, the Secretary rejected the significance of the Black Hills population of American dipper under the DPS policy and thereby determined the petition to list the Black Hills population of American dipper did not present substantial scientific information indicating listing under the ESA may be warranted. In particular, the finding stated:

[W]e do not believe the petition presents substantial scientific information that the clean, cold swift streams of the Black Hills occupied by dippers are an ecological setting that is unique for the species [and that] the petition does not present substantial scientific information that loss of the population segment would result in a significant gap in the range of the taxon.

71 Fed. Reg. 4343. The finding also discounted information regarding the genetic distinctiveness of the American dipper as evidence of the significance of the population, stating:

We are aware that a genetic analysis is being conducted to determine whether the Black Hills population of the American dipper is genetically distinct from other American dipper populations in North America (C. Anderson, Black Hills State University, pers. comm.. 2005). To date, the research has analyzed samples from 6 populations (Black Hills, SD; Bighorns, WY; and four locations in west central Montana and east central Idaho). Preliminary information from the research suggests that genetic differences may exist among the dipper populations studied. However, these results are too preliminary to determine the significance of the Black Hills population of American dipper to the taxon as a whole.

Id. The Secretary concluded in the negative 90-day finding:

On the basis of our review, we find that the petition does not present substantial scientific or commercial information to indicate that listing the American dipper in the Black Hills of South Dakota may be warranted. This finding is based on the lack of substantial evidence to indicate that the American dipper in the Black Hills of South Dakota constitutes a valid DPS. Although the population is discrete, neither the information in

the petition nor the information readily available in our files constitutes substantial scientific information that the Black Hills dipper population is significantly unique in relation to the remainder of the taxon.

71 Fed. Reg. 4344.

Violations of the ESA

For the foregoing reasons, the negative 90-day finding regarding the petition to list the Black Hills population of American dipper as a threatened or endangered DPS under the ESA is illegal and we intend to sue the Secretary of the Interior, the Director of the Fish and Wildlife Service, and Supervisor Gober after 60 days for these illegalities.

1. Violation of 16 USC § 1534(b)(3)(A) and 50 CFR § 424.14(b)(1),

In making a negative 90-day finding regarding the petition to list the Black Hills population of American dipper as a threatened or endangered DPS under the ESA, the Secretary failed to assess whether the petition presented substantial scientific information indicating listing may be warranted. In particular, the Secretary ignored, misconstrued, and/or subverted substantial scientific information presented in the petition to list the Black Hills population of American dipper supporting the significance of the population that would lead a reasonable person to believe that listing may be warranted:

- The Secretary failed to review and/or address all the scientific information, including previous findings made by the Secretary of the Interior, presented in the petition to list the Black Hills population of American dipper as a threatened or endangered DPS related to the significance of the population in determining whether the petition presented substantial scientific information indicating listing may be warranted;
- The Secretary ignored, misconstrued, and/or subverted substantial scientific information presented in the petition and readily available in her files indicating the Black Hills population American dipper persists in an ecological setting that is unique to the species. In particular, the Secretary ignored, misconstrued, and/or subverted substantial scientific information regarding the uniqueness of the Black Hills ecosystem, the setting within which the Black Hills population of American dipper persists;
- The Secretary ignored, misconstrued, and/or subverted substantial scientific information presented in the petition and readily available in her files indicating that the loss of the Black Hills population of American dipper would result in a significant gap in the range of the species. In particular, the Secretary ignored, misconstrued, and/or subverted substantial scientific information regarding the biological significance of the population;
- The Secretary ignored, misconstrued, and/or subverted substantial scientific information in the petition and readily available in her files indicating the Black Hills population of American dipper is genetically distinct and therefore differs markedly

from other populations of American dipper. Any reasonable person reading the petition and information readily available in the Secretary's files would conclude that the Black Hills population of American dipper may be significant, especially since the Secretary stated in the negative 90-day finding that "genetic differences may exist" between the Black Hills and other populations of American dipper; and

- Overall, the Secretary did not assess whether the petition and information readily available in her files presented "substantial scientific information" indicating the Black Hills population may be significant. Instead, the Secretary assessed the petition and information readily available in her files to determine whether the population was, in fact, significant, a determination that can only be made at the 12-month finding stage and after a rigorous review of the status of the species. Indeed, with regards to genetic information supporting the significance of the Black Hills population of American dipper, the Secretary concluded that the "results are too preliminary to determine the significance of the Black Hills population of American dipper to the taxon as a whole." Yet, the determination of whether the Black Hills population of American dipper is, in fact, significant under the DPS policy is made only through a 12-month finding.

2. The Secretary's Decision is Arbitrary and Capricious in Violation of the APA

Although the APA does not require that we give notice, we note that the Secretary is in violation of the APA for arbitrarily and capriciously:

- Contradicting previous findings and/or positions published in the federal register regarding the significance of populations of other species listed as threatened, endangered, and/or candidates under the ESA;
- Recognizing that the Black Hills "has many unique ecological features," yet concluding the Black Hills population of American dipper does not persist in an ecological setting that is unique to the taxon;
- Failing to address and/or explain why the scientific information presented in the petition to list the Black Hills population of American dipper as a threatened or endangered DPS related to the significance of the population was not "substantial information";
- Failing to recognize preliminary genetics data as "substantial information" and/or to explain why preliminary genetics data did not constitute "substantial information";
- In assessing whether the petition presented substantial scientific information indicating the Black Hills population of American dipper may be significant, the Secretary instead assessed whether, in fact, the population was significant. The assessment of whether the population is, in fact, significant is not conducted at the 90-day finding stage;
- Using an inappropriate standard in determining the "significance" of the Black Hills population of American dipper. Instead of determining whether the population was

significant, the Secretary instead assessed whether the population was “uniquely significant,” in contravention of the DPS policy; and finally

- Issuing a contradictory 90-day finding. In particular, while stating that “We do not conduct additional research to make a 90-day finding, nor do we subject the petition to rigorous critical,” the Secretary did in fact subject the petition to rigorous review. And, while recognizing the requirement to “acknowledge the petitioner’s sources and characterizations of the information unless we have specific information to the contrary,” the Secretary did not acknowledge the sources and characterizations of scientific information presented in the petition to list the Black Hills population of American dipper as a threatened or endangered DPS under the ESA.

We appreciate your time and attention to this matter. If you believe any of the above information is incorrect, or if you would like to discuss the matter further, please contact Jeremy Nichols at Biodiversity Conservation Alliance.



Jeremy Nichols
Conservation Director
Biodiversity Conservation Alliance—Denver Office
1536 Wynkoop, Suite B501
Denver, CO 80202
(303) 454-3370
jeremy@voiceforthewild.org

cc: Region 6 Director, U.S. Fish and Wildlife Service